A

TANG HAK JU v. PENGARAH TANAH DAN GALIAN PULAU PINANG & ORS

HIGH COURT MALAYA, PULAU PINANG
LIM CHONG FONG JC
[ORIGINATING SUMMONS NO: 24-151-2005]
B 1 SEPTEMBER 2016

CIVIL PROCEDURE: *Contempt of court – Application to set aside leave – Whether leave to commence committal proceedings made for collateral purpose – Non-disclosure of material facts in ex parte application for leave – Whether material*
C *and relevant – Whether there was inordinate delay in making ex parte application – Whether procedural requirement in procuring leave pursuant to O. 52 r. 3 of the Rules of Court 2012 complied with – Whether notice to show cause a condition precedent – Whether monetary judgment could be enforced by committal proceedings – Whether non-endorsement of penal notice fatal to application for leave*
D *to commit*

CIVIL PROCEDURE: *Judgments and orders – Setting aside – Application to set aside leave to commence committal proceedings – Whether leave to commence committal proceedings made for collateral purpose – Non-disclosure of material facts in ex parte application for leave – Whether material and relevant – Whether there*
E *was inordinate delay in making ex parte application – Whether procedural requirement in procuring leave pursuant to O. 52 r. 3 of the Rules of Court 2012 complied with – Whether notice to show cause a condition precedent – Whether monetary judgment could be enforced by committal proceedings – Whether non-endorsement of penal notice fatal to application for leave to commit*

F

The plaintiff was alienated a piece of quarry land by the defendants by way of a 15-year state lease with the condition that the land must be used for quarrying purposes. A land title to that effect was issued to the plaintiff. The defendants, however, cancelled the aforesaid land title. The plaintiff challenged the cancellation of the land title in the High Court and obtained
G an order that the defendants jointly and severally pay damages to the plaintiff as the result of the cancellation of the land title. The defendants appealed to the judge in chambers against the assessment of damages of the Deputy Registrar. In the meantime, the plaintiff filed a judicial review application in the High Court for the issuance of a certificate pursuant to s. 33(3) of the
H Government Proceedings Act 1956 and an order for *mandamus* against the defendants to comply with the certificate. The plaintiff obtained leave under O. 53 r. 3 of the Rules of the High Court 1980. However, the plaintiff's aforesaid application for judicial review was dismissed but the defendants were directed to pay half the judgment sum into court pending the
I defendants' appeal to the judge in chambers against the assessment of damages. Accordingly, the defendants made the payment of the sum of

RM14,678,135.50 into court. The plaintiff appealed to the Court of Appeal against the dismissal of his judicial review application which was allowed and the sum of RM14,678,135.50 was ordered to be paid to the plaintiff on account of the judgment sum pursuant to the aforesaid Registrar's certificate. In the meantime, the judge in chambers affirmed the Deputy Registrar's assessment of damages and the defendants appealed against the said decision. The Court of Appeal allowed the appeal and ordered the assessment of damages be sent back to the High Court for re-assessment based on tortious principles. In addition, the Court of Appeal also ordered that the monies paid to the plaintiff be repaid to the State of Penang within 30 days. The repayment order was served by the defendants on the plaintiff. The plaintiff applied for stay of execution of the repayment order but was refused by both the Court of Appeal and the Federal Court. The defendants filed an application to regularise the amount in the aforesaid repayment order and the Court of Appeal allowed the application. The amended repayment order was served by the defendants on the plaintiff. By reason of the plaintiff's failure to pay the State of Penang pursuant to the amended repayment order, the defendants filed their *ex parte* application for leave to commence committal proceedings against the plaintiff for contempt of court. Thus, this was an application (encl. DD) brought by the plaintiff to set aside the *ex parte* order obtained by the defendants on grounds that (i) it was an abuse of process made for a collateral purpose; (ii) there was non-disclosure of material facts in the *ex parte* application; (iii) there was inordinate delay in making the *ex parte* application; (iv) there was no show cause notice served upon the plaintiff personally; (v) the amended repayment order which was a monetary judgment could not be enforced by committal proceedings; and (vi) no penal notice was endorsed on the amended repayment order.

Held (disallowing application):

(1) Unless and until a stay of that order had been obtained by the plaintiff, he must comply with it. The Court of Appeal and the Federal Court had denied the prior applications of the plaintiff for a stay of the order. The defendants had not pursued their application with a collateral purpose in bad faith in the sense as made out by the plaintiff. The defendants were merely exercising their rights provided by law to seek compliance with the amended repayment order. (paras 31 & 32)

(2) The alleged facts that were not disclosed here were not material, if not irrelevant. Very pertinently, the plaintiff was speculating that the outcome of the re-assessment would be dominantly in his favour. This was very presumptuous on the part of the plaintiff. That notwithstanding, the alleged undisclosed facts would not alter the principal fact that the amended repayment order was not complied by the plaintiff and they would not have influenced this court not to give leave to commit the plaintiff for contempt of court for disobeying the court order. (para 36)

(3) The timeliness or otherwise in the filing of the application is a question of fact dependent upon the circumstances of each case. According to the plaintiff, the defendants only filed their application more than a year after the Court of Appeal allowed their application to amend the repayment order. The defendants replied that the application was filed within a reasonable time after having given the plaintiff sufficient time to comply with the amended repayment order. This court accepted the defendants' explanation to afford the plaintiff sufficient time to pay in light of the plaintiff's excuse for his inability to repay by reason he had utilised parts of the sum of money paid to him to satisfy debts he owed to third parties as well as for his investments and business ventures. In this context, it was understandable that the defendants gave the plaintiff enough time to liquidate or recoup the money to repay, hence the delayed filing of the application. (paras 37-39)

(4) The defendants had fully complied with the procedural requirement in procuring leave from the High Court pursuant to O. 52 r. 3 of the Rules of Court 2012. There was no express mention in the said O. 52 r. 3 of the notice to show cause referred to in O. 52 r. 2A as a condition precedent to the application to obtain leave. Consequently, the notice to show cause meant the documents referred to O. 52 r. 4(3) particularly the notice of application itself. Premised on that, the plaintiff's argument was misconceived. (paras 44 & 45)

(5) Committal proceedings are available to enforce a commanded act within the prescribed time notwithstanding that the substance of it is a monetary judgment (*Hong Kwi Seong v. Ganad Media Sdn Bhd & Another Appeal*). Consequently, the plaintiff's argument was devoid of merit. (para 52)

(6) The absence of the penal notice was not fatal since the plaintiff had knowledge of the amended repayment order. The plaintiff had been served the order and he had also previously applied for a stay of execution of the order in the Court of Appeal and Federal Court. Thus, the non-endorsement of the penal notice in the amended repayment order was not fatal to the defendants' application for leave to commit the plaintiff. (paras 54-56)

Case(s) referred to:

Celcom (Malaysia) Bhd v. Quantum Business Sdn Bhd [2006] 1 LNS 345 HC ***(refd)***

Class One Video Distributors Sdn Bhd & Anor v. Chanan Singh Sher Singh & Anor [1997] 3 CLJ 694 HC ***(refd)***

Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***

Hong Kwi Seong v. Ganad Media Sdn Bhd & Another Appeal [2012] 8 CLJ 667 CA ***(refd)***

Hong Leong Bank Bhd v. Phung Tze Thiam [2008] 4 CLJ 742 CA ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(dist)***
Lembah Mayang Sdn Bhd & Ors v. Pengarah Jabatan Perhutanan & Anor [2004] 6 CLJ 465 HC ***(refd)***
M Cheng Construction Sdn Bhd v. Hasman Jalil & Anor [2003] 6 CLJ 251 HC ***(refd)***
Malaysian Bar v. Tan Sri Dato' Abdul Hamid Omar [1989] 2 CLJ 373; [1989] 1 CLJ (Rep) 92 SC ***(refd)***
Ronald Quay Sdn Bhd v. Maheswary Sdn Bhd [1986] 2 CLJ 275; [1986] CLJ (Rep) 659 HC ***(refd)***
Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***
Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***
Tan Sri G Darshan Singh v. Tetuan Azam Lim & Pang [2013] 1 CLJ 1060 CA ***(dist)***
Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchathiram [2007] 9 CLJ 784 HC ***(refd)***
Yeoh Tai Chuan & Anor v. Tan Chong Kean [2014] 1 LNS 1790 CA ***(dist)***
Young v. Bristol Aeroplane Co Ltd [1944] KB 718 ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, s. 33(3)
Rules of Court 2012, O. 52 rr. 2, 2A, 2B, 3, 4(3)
Rules of the High Court 1980, O. 53 r. 3

For the plaintiff - Wong Yee Chue; M/s YC Wong
For the defendants - Charanjit Singh & Pavandeep Singh; State Legal Advisor's Office, Pulau Pinang

Reported by Suhainah Wahiduddin

JUDGMENT

Lim Chong Fong JC:

Introduction

[1] This is an application (encl. DD) brought by the plaintiff to set aside the *ex parte* order dated 15 October 2015 obtained by the defendants granting leave to them to commence committal proceedings against the plaintiff for alleged contempt of court.

[2] The relevant cause papers for the purpose of this application are as follows:

(i) Defendants' *ex parte* notice of application dated 15 September 2015;

(ii) Defendants' supporting affidavit of Haji Akmar bin Haji Omar affirmed on 14 September 2015;

(iii) Statement pursuant to O. 52 r. 3 of the Rules of Court 2012 dated 14 September 2015;

A (iv) *Ex parte* order dated 15 October 2015;

(v) Defendants' notice of application dated 15 November 2015 to commence committal proceedings;

(vi) Plaintiff's notice of application dated 19 November 2015;

B (vii) Plaintiff's supporting affidavit of Tang Hak Ju affirmed on 19 November 2015;

(viii) Defendants' affidavit in reply of Haji Akmar bin Haji Omar affirmed on 11 January 2016;

C (ix) Plaintiff's affidavit in reply of Tang Hak Ju affirmed on 28 January 2016.

[3] After reading the written submissions filed by the parties, I heard counsel on 9 June and 13 July 2016. On 29 July 2016, I disallowed the plaintiff's application (encl. DD). I made no order as to costs in conjunction
D with the plaintiff's other application (encl. BB) that was subsequently heard on 29 July 2016 and conditionally allowed.

[4] The plaintiff is dissatisfied with my decision in respect of the plaintiff's application (encl. DD) and has on 11 August 2016 filed his notice of appeal to the Court of Appeal.

E

[5] Consequently, I provide hereinbelow the grounds in support of my decision.

Salient Facts

F **[6]** In 2003, the plaintiff was alienated a piece of quarry land by the defendants. The alienation was by way of a 15-year state lease with the condition that the land must be used for quarrying purposes. A land title to that effect was issued to the plaintiff.

[7] The defendants on 24 January 2005 cancelled the aforesaid land title.

G **[8]** The plaintiff challenged the cancellation of the land title in the High Court and the plaintiff on 4 October 2005 obtained an order that the defendants jointly and severally pay damages to the plaintiff as the result of the cancellation of the land title.

H **[9]** Pursuant to the aforesaid order dated 4 October 2005, the Deputy Registrar on 21 September 2007 assessed the plaintiff's damages in the amount of RM29,356,271 with interest at 8% per annum calculated from 24 January 2005. The defendants appealed to the judge in chambers against the assessment of damages of the Deputy Registrar.

I **[10]** In the meantime, the plaintiff on 19 September 2008 filed a judicial review application in the High Court for the issuance of a certificate pursuant to s. 33(3) of the Government Proceedings Act 1956 and an order for *mandamus* against the defendants to comply with the certificate.

[11] The plaintiff obtained leave under O. 53 r. 3 of the Rules of the High Court 1980 on 26 September 2008. A

[12] Consequently, the Registrar issued the aforesaid certificate in the following terms:

(i) the judgment sum is RM29,356,271; B

(ii) payment of half of the judgment sum is stayed pending the disposal of the defendants' appeal to the judge in chambers on the assessment of damages;

(iii) hence, the sum payable in accordance with the certificate is RM14,768,135 with interest at 8% per annum from 24 January 2005. C

[13] On 19 February 2009, the plaintiff's aforesaid application for judicial review was dismissed but the defendants were directed to pay half the judgment sum into court pending the defendants' appeal to the judge in chambers against the assessment of damages. D

[14] Accordingly, the defendants on 13 May 2009 made the payment of the sum of RM14,678,135.50 into court.

[15] The plaintiff appealed to the Court of Appeal against the dismissal of his judicial review application. The Court of Appeal on 20 July 2009 allowed the plaintiff's appeal and ordered that the sum of RM14,678,135.50 that was paid into court be paid to the plaintiff on account of the judgment sum pursuant to the aforesaid Registrar's certificate. E

[16] Accordingly, the payment into court was paid out to the plaintiff on 11 August 2009. F

[17] On 6 October 2009, the judge in chambers affirmed the Deputy Registrar's assessment of damages.

[18] The defendants appealed to the Court of Appeal against the decision of the judge in chambers. On 11 January 2012, the Court of Appeal allowed the appeal and ordered the assessment of damages be sent back to the High Court for re-assessment based on tortious principle. In addition, the Court of Appeal also ordered that the monies paid to the plaintiff, less such sum preserved by the Court of Appeal be repaid to the State of Penang within 30 days. Therefore, the amount due and payable by the plaintiff as of the date of the order of the Court of Appeal was RM14,091,080.50 and the repayment order was served by the defendants on the plaintiff on 14 May 2012. G H

[19] The plaintiff applied for stay of execution of the repayment order but was refused by both the Court of Appeal and the Federal Court pending the plaintiff's application for leave to appeal to the Federal Court. I

[20] The plaintiff filed the application for leave to appeal to the Federal Court on 22 September 2014. The application was however dismissed by the Federal Court on 28 January 2015.

[21] Nevertheless, the defendants on 10 June 2014 filed an application to regularise the amount in the aforesaid repayment order and the Court of Appeal allowed the application on 28 August 2014. The amended repayment order was served by the defendants on the plaintiff on 28 January 2015.

[22] By reason of the plaintiff's failure or neglect to pay the State of Penang pursuant to the amended repayment order, the defendants therefore on 15 September 2015 filed their *ex parte* application for leave to commence committal proceedings against the plaintiff for contempt of court. Leave was obtained on 15 September 2015.

[23] In the meantime, the re-assessment of damages based on tortious principles before the Deputy Registrar has been on-going since February 2013.

Contentions Of The Parties

[24] The plaintiff in gist contended that the *ex parte* order obtained by the defendants ought to be set aside on the following six grounds:

(i) It was an abuse of process made for a collateral purpose;

(ii) There was non-disclosure of material facts in the *ex parte* application;

(iii) There was inordinate delay in making the *ex parte* application;

(iv) There was no show cause notice served upon the plaintiff personally;

(v) The amended repayment order which is a monetary judgment cannot be enforced by committal proceedings; and

(vi) No penal notice was endorsed on the amended repayment order.

[25] The defendants in reply denied the plaintiff's contentions and contended that the *ex parte* order was properly and regularly obtained. The obtaining of the order necessitated by the plaintiff's contemptuous conduct in failing or refusing to comply with amended repayment order because the plaintiff had utilised parts of the sum of money paid to him to satisfy debts he owed to third parties as well as for his investments and business ventures.

Findings Of The Court

[26] It is trite that the court has the inherent jurisdiction to set aside an *ex parte* order for leave to commence committal proceedings. In this regard, Abdul Wahab Patail J (later JCA) held as follows in *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchathiram* [2007] 9 CLJ 784 at 786:

> [3] Although it is true that a *prima facie* finding of contempt is necessary to be made out for leave to be granted, it does not necessarily follow that the defendant is barred from an application to set aside leave. Where such

an application is made, it must be heard first before the hearing on committal. There is the argument that the court should not entertain applications to set aside leave since the issue of whether there was contempt would be settled in the committal proceeding itself. Patent injustice could occur if a party obtains leave but chooses not to proceed with committal proceedings: would the other party always be barred from being heard in other cases? The application for leave to commence committal proceedings is made *ex parte*, with the defendant having no opportunity of being heard. The *ex parte* application for leave authorises putting the defendant into having to incur the cost to defend himself. The full burden of that cost might be avoided if an application to set aside leave is successful. Whether such an application is successful must depend upon the circumstances and merits of each case. For example, if the court had been misled into granting leave, the court will set aside leave which has been granted.

[27] The principles involved in an application to set aside the leave that has been obtained *ex parte* has been set out in the Federal Court case of *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849 at 861; [2012] 3 MLJ 458 where Arifin Zakaria CJ said as follows at 468-469:

[29] It is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided procedural safeguards in committal proceeding which requires strict compliance. In this regard, Cross J in *Re B (JA) (An Infant)* [1965] 1 Ch 1112 had this to say:

> Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations. For example, it is provided that there must be personal service of the motion on him even though he appears by solicitors, and that the notice of motion must set out the grounds on which he is said to be in contempt; further, he must be served as well as with the motion, with the affidavits which constitute the evidence in support of it.
>
> It is clear that if safeguards such as these have not been observed in any particular case, then the process is defective even though in the particular case no harm may have been done. For example, if the notice has not been personally served the fact that the respondent knows all about it, and indeed attends the hearing of the motion, makes no difference. In the same way, as is shown by *Taylor v. Roe*, if the notice of motion does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of motion, that is a fatal defect, even though the defendant gets to know everything before the motion comes on, and indeed answers the affidavits.

> When, however, one passes away from safeguards which are laid down in the interests of the contemnor and comes to consider mere verbal deficiencies in the documents in question – cases where the documents do not comply strictly with the rules, but it is impossible that in any conceivable case the contemnor could be in any way prejudiced by the defects – then it seems to me that there is no reason why the courts should be any slower to waive such technical irregularities in a committal proceeding than they would be in any other proceeding.

[28] Against this backdrop, I dealt with the six grounds raised by the plaintiff *seriatim*.

[29] Firstly, the plaintiff claimed that the collateral purpose of the defendants was to frustrate the plaintiff's re-assessment of the damages.

[30] In this respect, the plaintiff contended that the defendants filed their *ex parte* application late when the re-assessment of damages before the Deputy Registrar was scheduled to commence, *to wit*: just 15 days prior the last case management date. Furthermore, the defendants upon obtaining order kept using the disingenuous argument that the plaintiff should not be heard until after he purged his contempt. According to the plaintiff, it was an abuse of process following *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533; [1999] 4 MLJ 637.

[31] Apposite to that, the defendants replied that they were merely exercising their rights provided by law to seek compliance with the amended repayment order.

[32] I accepted the defendants' justification and I was of the view that unless and until a stay of that order has been obtained by the plaintiff, he must comply with it. I observed that the Court of Appeal and Federal Court had denied the prior applications of the plaintiff for a stay of the order. I was therefore not convinced that the defendants pursued their application with a collateral purpose in bad faith in the sense as made out by the plaintiff. The facts and contempt involved in the case of *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd (supra)* relied upon by the plaintiff were vastly different.

[33] Secondly, the plaintiff claimed that the defendants failed to ensure that all material facts were fully disclosed in their *ex parte* application. They were that the defendants were never interested to enforce the amended repayment order by reason that they had previously filed several notices of motion/ application to seek enforcement thereof that were either dismissed or withdrawn for reasons best known to the defendants. In addition, the defendants failed to disclose that the re-assessment of damages process had been on-going for two years and there would be a likelihood that the plaintiff would recover an amount in excess of the amount to be repaid based on the

amended repayment order as disclosed in the affidavit of the plaintiff's expert witness. The plaintiff relied on the cases of *Tan Sri G Darshan Singh v. Tetuan Azam Lim & Pang* [2013] 1 CLJ 1060; [2013] 5 MLJ 541 and *Yeoh Tai Chuan & Anor v. Tan Chong Kean* [2014] 1 LNS 1790 in support of his contention.

[34] In rebuttal, the defendants contended that they have disclosed all the material facts in support of the plaintiff's wilful breach of the amended repayment order. The previous notices of application/motions filed by the defendants as well as the on-going process of the re-assessment of damages were irrelevant and did not alter the fact that the plaintiff failed to comply with the amended re-payment order.

[35] I have read the cases of *Tan Sri Darshan Singh v. Tetuan Azam Lim & Pang (supra)* and *Yeoh Tai Chuan & Anor v. Tan Chong Kean (supra)* relied upon by the plaintiff and they are clear to me that the materiality or otherwise of the facts that ought to be disclosed is much dependent upon the unique circumstances of each case. The facts therein were obviously different from those here.

[36] Again I accepted the defendants' contention and I was of the view that the alleged facts that were not disclosed here were not material, if not irrelevant. Very pertinently, the plaintiff was speculating that the outcome of the re-assessment would be dominantly in his favour. This is very presumptuous on the part of the plaintiff. That notwithstanding, the alleged undisclosed facts would not alter the principal fact that the amended repayment order wasn't complied by the plaintiff and they would not have influenced me not to give leave to commit the plaintiff for contempt of court for disobeying the court order.

[37] Thirdly, the plaintiff complained that the defendants' application was filed inordinately late relying on the Supreme Court decision of *Malaysian Bar v. Tan Sri Dato' Abdul Hamid Omar* [1989] 2 CLJ 373; [1989] 1 CLJ (Rep) 92; [1989] 2 MLJ 281. According to the plaintiff, the defendants only filed their application more than a year after the Court of Appeal allowed their application to amend the repayment order.

[38] The defendants in reply contended that the application was filed within a reasonable time after having given the plaintiff sufficient time to comply with the amended repayment order.

[39] The timeliness or otherwise in the filing of the application is again a question of fact dependent upon the circumstances of each case. It is discretionary and I accepted the defendants' explanation to afford the plaintiff sufficient time to pay in light of the plaintiff's excuse for his inability to repay by reason he had utilised parts of the sum of money paid to him to satisfy debts he owed to third parties as well as for his investments and

business ventures. In this context, it is understandable that the defendants gave the plaintiff enough time to liquidate or recoup the money to repay, hence the delayed filing of the application.

[40] Fourthly, the plaintiff contended that the defendants failed to comply with the strict procedural requirement of O. 52 r. 2B of the Rules of Court 2012 and therefore was fatal to the defendants' application. The plaintiff placed emphasis on the Federal Court case of *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong @ George Lim & Ors (supra)* where Arifin Zakaria CJ said at 861 (CLJ); 468 (MLJ):

> [29] It is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided for procedural safeguards in committal proceeding which requires strict compliance.

[41] The defendants on the other hand replied that they have fully complied with procedural requirement in procuring leave from the High Court pursuant to O. 52 r. 3 of the Rules of Court 2012. In this regard, they contended that there was no requirement therein the leave application must be preceded by a show cause notice that has to be personally served upon the plaintiff.

[42] It is apt for me here to reproduce the provisions in O. 52 rr. 2 to 4 of the Rules of Court 2012:

> 2. Committal for contempt of Court (O. 52 r. 2)
>
> The Court may, on the application of any party to any cause or matter or on its own motion, make an order of committal in Form 107.
>
> 2A. Contempt committed in the face of the Court (O. 52 r. 2A)
>
> (1) If a contempt is committed in the face of the Court, it shall not be necessary to serve a formal notice to show cause, but the Court shall ensure that the person alleged to be in contempt understands the nature of the offence alleged against him and has the opportunity to be heard in his own defence, and the Court shall make a proper record of the proceedings.
>
> (2) Where a Judge is satisfied that a contempt has been committed in the face of the Court, the Judge may order the contemnor to appear before him on the same day at the time fixed by the Court for the purpose of purging his contempt.
>
> (3) Where such person has purged his contempt by tendering his unreserved apology to the Court and the Judge considers the contempt to be not of a serious nature, the Judge may excuse such person and no further action shall be taken against him.
>
> (4) Where such person declines or refuses to purge his contempt, then the Judge shall sentence him.

2B. Other cases of contempt (O. 52 r. 2B)

In all other cases of contempt of Court, a formal notice to show cause why he should not be committed to the prison or fined shall be served personally.

3. Application to Court (O. 52 r. 3)

(1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made *ex parte* to the Court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

4. Application for order after leave to apply granted (O. 52 r. 4)

(1) When leave has been granted under rule 3 to apply for an order of committal, the application for the order must be made by notice of application to the Court, and, unless the Court granting leave has otherwise directed, there must be at least eight clear days between the service of the notice of application and the day named therein for the hearing.

(2) Unless within fourteen days after such leave was granted the notice of application is filed, the leave shall lapse.

(3) Subject to paragraph (4), the notice, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 3 and the order granting such leave, must be served personally on the person sought to be committed.

(4) Without prejudice to the powers of the Court or Judge under Order 62, rule 5, the Court or Judge may dispense with service of the notice under this rule if it or he thinks it just to do so.

[43] I was mindful that the *Malaysian Civil Procedure 2015* Volume, para. 52/2B/2 provided as follows:

This rule deals with other forms of contempt of court apart from contempt in the face of court (which is dealt with under r. 2A). This rule provides that a formal notice to show cause must be served personally. In the main commentary it is stated that "formal notice to show cause" in other cases of contempt is presumably meant to refer to the documents to be served under r. 4(3). However the wording of this rule when read with rule 2A appears to require a notice to be served before the making of an application under r. 4(3). The philosophy behind the rule appears to be that the alleged contemnor should be given an opportunity of explaining himself to the putative applicant well before proceedings are launched. If

A the explanation is unacceptable, the Court may be moved and the explanation or the lack of any placed before it. It appears that this rule provides additional protection to the alleged contemnor.

[44] The above commentary seems to be ambivalent. As submitted by the defendants, there is no express mention in O. 52 r. 3 of the notice to show B cause referred to in O. 52 r. 2A as a condition precedent to the application to obtain leave. In *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673, Nik Hashim FCJ held as follows at 688:

> [18] In construing a statute, the duty of the court is limited to interpreting the words used by the legislature and to give effect to the words used C by it. The court is not entitled to read words into a statute unless clear reason for it is to be found in the statute itself.

[45] Consequently and as also alluded to in the *Malaysian Civil Procedure 2015*, I was of the view that the notice to show cause meant the documents referred to O. 52 r. 4(3) particularly the notice of application itself and I so D hold accordingly. Premised on that, I therefore found the plaintiff's argument misconceived.

[46] Fifthly, the plaintiff's contention that the amended repayment order is a monetary judgment that wasn't capable of enforcement by way of committal is the principal bone of contention here.

E

[47] In this regard, I reproduced the amended re-payment order that was made by the Court of Appeal on 28 August 2014 that regularised and amended the earlier order dated 11 January 2012. The order read as follows:

> RAYUAN INI yang ditetapkan untuk pendengaran pada 19 September F 2011 dalam kehadiran Malik Imtiaz Sarwar (Jenine Gill bersamanya) kaunsel untuk Perayu-Perayu dan Mahinder Singh Dulku (bersama Y.C. Wong) peguam bagi Responden DAN SETELAH MEMBACA Rekod Rayuan yang difailkan di sini DAN SETELAH MENDENGAR hujahan pihak-pihak yang tersebut DAN ditangguhkan ke hari ini untuk keputusan dalam kehadiran pihak-pihak yang sama kecuali Janine Gill.
>
> G MAKA ADALAH SEBULAT SUARANYA DIPERINTAHKAN bahawa:
>
> (1) Jumlah gantirugi untuk kehilangan pendapatan bersih dibenarkan oleh Mahkamah Tinggi diketepikan dan diremit ke Mahkamah Tinggi untuk ditaksirkan semula oleh Timbalan Pendaftar berdasarkan prinsip-prinsip H tort;
>
> (2) Jumlah gantirugi untuk perbelanjaan terbuang yang dibenarkan oleh Mahkamah Tinggi adalah dikurangkan sebanyak RM176,486-00 kepada RM481,785-00;
>
> I (3) Jumlah gantirugi untuk kerosakan goodwill yang dibenarkan oleh Mahkamah Tinggi diketepikan;

(4) Perintah Mahkamah Tinggi mengenai faedah dikekalkan;

(5) Kos rayuan ini dijadikan kos dalam kausa;

DAN SETERUSNYA ATAS PERMOHONAN LISAN oleh peguam Perayu-Perayu DAN SETELAH MENDENGAR peguam-peguam kedua-dua pihak MAKA ADALAH SELANJUTNYA DIPERINTAHKAN bahawa Responden hendaklah dalam tempoh 30 hari dari tarikh Perintah ini mengembalikan jumlah wang yang telah dibayar oleh Perayu-Perayu kepadanya terhadap jumlah penghakiman yang dibenarkan oleh Mahkamah Tinggi melainkan jumlah gantirugi yang dikekalkan melalui Perintah ini DAN SELANJUTNYA ATAS PERMOHONAN SECARA LISAN oleh peguam-peguam Responden DAN SETELAH MENDENGAR peguam-peguam kedua-dua pihak MAKA ADALAH JUGA DIPERINTAHKAN bahawa permohonan lisan Responden untuk penggantungan pelaksanaan Perintah di atas ditolak dan Responden diarahkan untuk membuat permohonan secara formal.

[48] Accordingly, the plaintiff relied on the Court of Appeal case of *Hong Leong Bank Bhd v. Phung Tze Thiam* [2008] 4 CLJ 742 where Gopal Sri Ram JCA (later FCJ) held as follows at 746-747:

[4] The second point we make has to do with the choice of the enforcement remedy. Can the appellant enforce the order of this court directing the refund by way of committal proceedings? In answering this question, we must bear in mind that it is only an order that requires a party to do or refrain from doing an act that may be enforced by committal for contempt. That much is clear from the terms of RHC O. 45 r. 5 which provides as follows:

(1) Where:

(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or

(b) a person disobeys a judgment or order requiring him to abstain from doing an act,

then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say:

(i) with the leave of the Court, an order of committal;

(ii) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;

(iii) subject to the provisions of the Debtors Act, 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

A [5] Now, in *Re Oddy, Major v. Harness* [1906] 1 Ch 93 it was held by the English Court of Appeal that "an order to recover money is not an order on the defendants to do anything, and therefore that such order could not be enforced either by a supplementary order for the payment of the money within a fixed time or by attachment", per Luxmoore J in *Iberian Trust, Ltd v. Founders Trust and Investment Co, Ltd* [1932] 2 KB 87. The order B of 25 April 2007 in essence required the respondent to repay a part of the sum that had been paid to him by the appellant. In point of form, it may appear to be an order requiring the respondent to do an act, namely to refund the money. But a court is concerned with substance and not form. And the substance of the order under consideration here is that it is a money judgment and not a judgment requiring the performance of an act. C We must therefore answer the question we posed in para 4 of this judgment in the negative. That is to say, the order of this court dated 25 April 2007 cannot be enforced by means of committal proceedings. But that is not to say that the appellant bank is not without remedy. It may enforce the said order in the usual way in which money judgments are enforced. D

[49] The plaintiff implored upon me that I was bound to follow this Court of Appeal decision by virtue of the doctrine of *stare decisis* because the order in issue therein was very similar to that herein.

[50] On the other side, the defendants referred to a later Court of Appeal E case of *Hong Kwi Seong v. Ganad Media Sdn Bhd & Another Appeal* [2012] 8 CLJ 667 where Low Hop Bing JCA held as follows at pp. 472-476:

[10] Next, in *Hong Leong Bank*, *supra*, the Court of Appeal dealt with the second and final ground, touching on the choice of the enforcement remedy. The passages at pp. 746 and 747 (with emphasis added) merit F reproduction as follows:

...

[11] As alluded to above, the Court of Appeal relied on the above two English authorities and held that the bank cannot enforce the money judgment of the Court of Appeal directing the refund by way of committal G proceedings, as the money judgment is not a judgment requiring the performance of an act.

[12] We shall now proceed to embark on an analysis of the aforesaid two English authorities, as follows:

H (1) In *Re Oddy supra*,

(a) On the plaintiff's application, Buckley J made, *inter alia*, an order that Major, the plaintiff, should recover from Harness, the defendant the sum of £1248 lls, being the loss occasioned to the trust estate after deducting certain items already paid by Harness. The defendant's motion to discharge the order was I dismissed by Buckley J.

(b) The defendant's appeal was allowed by the Court of Appeal which held that judgment for recovery by the plaintiff from the defendant of a sum of money, instead of judgment in the usual form for payment of the money to the plaintiff by the defendant, could not be supplemented by a four-day order against the defendant in default of payment within the stipulated time, or by attachment. An order for the plaintiff to recover money is not an order on the defendants to do anything. Vaughan Williams LJ said at p. 98 that "there is a manifest difference between an order for payment and an order that the plaintiff do recover.

(2) In *Iberian Trust, Ltd supra*, the order was that the plaintiffs do have a return of the shares within fourteen days. Luxmoore J felt that the form of the order was a little unfortunate as it did not define the precise steps which had to be taken to transfer the shares in question from the defendant to the plaintiff. The terms of the order were too vague and did not specify that the defendant was to return the shares. In the circumstances, the defendant did not transfer the shares to the plaintiff. In dismissing the plaintiff's application for leave to issue writs of attachment against the directors of the defendant company, His Lordship referred to *In Re Oddy supra*, and said at p. 95 that the order did not direct the defendant to do anything; the order was that the plaintiff was to recover something from the defendant.

[13] We respectfully note that the two English authorities referred to in *Hong Leong Bank supra*, concern the construction of the crucial terms of the order. These terms ordered the plaintiff to recover the money, as in In *Re Oddy supra*; or the plaintiff to have a return of the shares, as in *Iberian Trust Ltd supra*. These orders did not require the defendant to do or refrain from doing an act, and hence, obviously, those orders could not be enforced against the defendant by way of committal for contempt.

[14] On the other hand, in *Hong Leong Bank supra*, the terms of the order did direct Phung to refund the sum paid to him, less the sum of RM130,000 paid to EPF, and so are vastly different from the terms of the orders prevailing in the aforesaid two English authorities. With the utmost respect, we are unable to agree with the decision of the Court of Appeal in *Hong Leong Bank supra*, that a money judgment directing Phung to repay the money could not be enforced by committal proceedings. While it is true that a money judgment could be enforced pursuant to the Debtors' Act 1957, the Act does not, either expressly or by necessary implication, exclude committal proceedings in the event of a defendant's refusal or neglect to do the act within the time specified in the money judgment. Hence, we respectfully hold that the decision of the Court of Appeal in *Hong Leong Bank supra*, does not assist the appellant in the instant appeal.

A [15] The specific terms of the judgment or order are of overriding importance, as they are to be construed by the court in order to determine the legal effect as to whether the defendant is required to do an act within a time specified therein and whether the defendant has refused or neglected to do so within the prescribed time in the context of O. 45 r. 1(a). The court will then decide whether or not to grant leave to the B plaintiff to pursue an order of committal under O. 45 r. 1(a)(i).

[16] Reverting to the instant appeal, the terms of the order in Bahasa Malaysia at p. 372 of the appeal record are translated by me (with emphasis added) as follows:

C (a) The defendant do pay to the second plaintiff (the respondent herein) RM245,938.27 together with interest in the sum of RM52,796.23 ie, at 4% per annum with effect from 18 August 1994 until 31 December 1999 amounting to RM298,737.50; and

D (b) The defendant do pay to the second plaintiff RM120,001.50 together with interest in the sum of RM25,762.51, both amounting to RM145,764.01.

(c) Both the payments in (a) and (b) amounting to RM444,501.51 to be made in five instalments ie, RM88,900.30 on the following dates *viz* 1 January 2008, 1 February 2008, E 1 March 2008, 1 April 2008 and 1 May 2008 respectively.

[17] The above order contains an indorsement (as translated) to the following effect:

If you, Hong Kwi Seong, the defendant named herein neglect to obey this order by the time therein limited to make payment amounting to F RM444,501.51 in five instalments *viz* RM88,900 per instalment on the following dates *viz* 1 January 2008, 1 February 2008, 1 March 2008, 1 April 2008 and 1 May 2008, you Hong Kwi Seong will be liable to process of execution for the purpose of compelling you to obey the same.

[18] It is plain to us that the terms of the order in the instant appeal are G readily distinguishable from those in *In Re Oddy supra*; and *Iberian Trust Ltd supra*.

[19] In the instant appeal, the terms of the order clearly directed the appellant to pay the judgment sum in five instalments on or before the respective dates. In other words, the appellant was directed to do an act within a specified date. Despite that, the appellant had refused or H neglected to do. The terms of the order in the instant appeal are peremptory in the sense that the appellant was commanded to make payment. These terms come within the scope of O. 45 r. 5(1)(a)(i), *supra*. We are therefore unable to sustain the submission presented for the defendant. We answer the above question in the affirmative.

I **[51]** From a careful reading of the later case of *Hong Kwi Seong v. Ganad Media Sdn Bhd & Another Appeal (supra)*, it was clear to me that the Court of Appeal has departed from its earlier case of *Hong Leong Bank Bhd v. Phung Tze Thiam (supra)*. Although not expressly stated in the judgment, it is

implicit that the Court of Appeal was of the opinion that it was not bound by its earlier decision because that decision was *per incuriam* following the principle set out in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718 (adopted and applied also by the Court of Appeal in *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285). This rationale for the departure is self-evident in paras. [14] to [16] of *Hong Kwi Seong v. Ganad Media Sdn Bhd & Another Appeal (supra)*.

[52] In the circumstances, I considered that I was instead bound by the Court of Appeal decision in *Hong Kwi Seong v. Ganad Media Sdn Bhd & Another Appeal (supra)*. That being the case, it is plain that committal proceedings are available to enforce a commanded act within the prescribed time notwithstanding that the substance of it is a monetary judgment. Consequently, I held that the plaintiff's argument here was devoid of merit.

[53] Sixthly, the plaintiff contended that the amended-repayment order was not enforceable because it was not endorsed with a penal notice following *M Cheng Construction Sdn Bhd v. Hasman Jalil & Anor* [2003] 6 CLJ 251.

[54] The defendants in reply contended that the absence of the penal notice wasn't fatal since the plaintiff had knowledge of the amended repayment order. In this respect, the plaintiff was served the order and he has also previously applied for a stay of execution of the order in the Court of Appeal and Federal Court.

[55] In *Class One Video Distributors Sdn Bhd & Anor v. Chanan Singh Sher Singh & Anor* [1997] 3 CLJ 694 at pp. 700-702; [1997] 5 MLJ 209, Haidar J (later CJ (Malaya)) held as follows at 215-216:

> In this case, though the order was not personally served on the second defendant, I am satisfied that the second defendant – having had the benefits of counsel's advice – is deemed to know of the terms of the order. In any event, the second defendant did not deny that he had knowledge of the terms of the order. The word 'otherwise' in r. 7(6) would be wide enough to cover this situation. In the circumstances, the conditions under r. 7(6) would have been satisfied though the order did not contain the penal notice required under r. 7(4). Though the service of the copy of the order had not been 'effected in accordance' with r. 7 – as I said earlier – the second defendant had full knowledge of the terms of the order and the order was for the second defendant to abstain from doing certain acts. In other words, the court has a discretion to enforce the order if the court was satisfied that the second defendant had notice of the order in one of the ways specified in sub-paras (a) and (b) of para. 6 of O. 45 r. 7 of the RHC. I am so satisfied.
>
> *In the circumstances I am of the view that, following Allport Alfred James, which cited with approval the English case of Sofroniou, the defect in not complying with the indorsement of the penal notice is not fatal so long as the second defendant had knowledge of the terms of the order*. It has been brought to my attention

recently the English Court of Appeal case of *Nicholls v. Nicholls* (1977) 147 NLJ 61, where the court reviewed the previous authorities on the subject of procedural irregularities either in the application to commit or in the committal order. Under the caption 'The Result of the Appeal', the Court of Appeal provided guidance for future cases as follows:

> (1) As committal orders involve the liberty of the subject, it is particularly important that the relevant rules are duly complied with. It remains the responsibility of the judge when signing the committal order to ensure that it is properly drawn and that it adequately particularises the breaches which have been proved and for which the sentence has been imposed.
>
> (2) As long as the contemnor had a fair trial and the order has been made on valid grounds, the existence of a defect either in the application to commit or in the committal order served will not result in the order being set aside except insofar as the interests of justice require this to be done.
>
> (3) Interests of justice will not require an order to be set aside where there is no prejudice caused as a result of errors in the application to commit or in the order to commit. When necessary the order can be amended.
>
> (4) When considering whether to set aside the order, the court should have regard to the interests of any other party and the need to uphold the reputation of the justice system.
>
> (5) If there has been a procedural irregularity or some other defect in the conduct of the proceedings which has occasioned injustice, the court will consider exercising its power to order a new trial unless there are circumstances which indicate that it would not be just to do so.
>
> In the circumstances, on the facts of this case the court, in my opinion, can and should rightly invoke its powers under r 7(6) and I do so accordingly. The defect in the order – that is, the failure to indorse the penal notice therein – is not fatally flawed. As I said earlier, the second defendant knew or is deemed to have known of the terms of the order and hence no prejudice is thereby caused to him for such irregularity.
>
> (emphasis added)

I also observed that the same outcome was reached in *Lembah Mayang Sdn Bhd & Ors v. Pengarah Jabatan Perhutanan & Anor* [2004] 6 CLJ 465.

[56] In the premises, I held that the non-endorsement of the penal notice in the amended repayment order wasn't fatal to the defendants' application for leave to commit the plaintiff.

[57] Finally, the plaintiff also raised a new contention that the court when granting leave to the defendants failed to consider that the plaintiff nevertheless has strong case to recover damages against the defendants

because the cancellation of the plaintiff's land title had been adjudged and is valid and still subsisting. The defendants have to ultimately pay the plaintiff damages to be re-assessed. In the circumstances, the plaintiff should have been accorded an automatic stay of the amended-re-payment order akin to that in summary judgment cases where there is a counterclaim: see *Ronald Quay Sdn Bhd v. Maheswary Sdn Bhd* [1986] 2 CLJ 275; [1986] CLJ (Rep) 659; [1987] 1 MLJ 322 and *Celcom (Malaysia) Bhd v. Quantum Business Sdn Bhd* [2006] 1 LNS 345.

[58] The defendants responded that the analogy is inapplicable to the application for leave to commit the plaintiff as this is not provided in O. 52 of the Rules of Court 2012 as well no case law squarely to that effect has been tendered by the plaintiff.

[59] I agreed with the defendants' contention and held that the analogy as contended by the plaintiff is inapplicable. To me, it is more appropriate to a stay application such as encl. BB that has been filed by the plaintiff too and awaiting hearing.

Conclusion

[60] It is for the foregoing reasons that I refused the plaintiff's application as so ordered.